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No. 10-185

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONER CORE COMMUNICATIONS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Core Communications, Inc., states that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONER CORE COMMUNICATIONS, INC.

There is no dispute that, under *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002), and *Iowa Utilities Board* v. *FCC*, 219 F.3d 744 (8th Cir. 2000), the FCC may not set reciprocal compensation rates under the 1996 Act. Nor is there any dispute that the ISP-bound calls at issue here are governed by that Act. Pet. App. 31a. And respondents do not contest that, "[u]ntil recently, the FCC consistently recognized that, where the 1996 Act applies, the Commission lacks authority to set rates under Section 201." Pet. 25.

The court below nonetheless held that the Commission could impose a $0.0007 rate cap on ISP-bound calls. Re-

spondents try to reconcile that result with *AT&T*, *Verizon*, and *Iowa Utilities* by urging that those cases involved *intra*state rather than *inter*state rates. But that claim ignores the text of §252 and this Court's cases interpreting it—neither of which draws any such distinction.

The FCC's attempt to set rates covered by §252 usurps authority Congress assigned to the States. That invasion of state authority is itself a matter of grave concern. And the severe burdens that the below-cost rate cap imposes only increase the case's importance. While respondents belittle dial-up Internet because it affects just 6% of the U.S. population, it is fanciful to suggest that an issue affecting *several million Americans* is insignificant. Moreover, the decision's rationale readily extends to other contexts—a fact the FCC nowhere denies.

I. The Decision Below Conflicts With Decisions Of This Court And The Eighth Circuit

In *AT&T* and *Verizon*, this Court made clear that the FCC can prescribe *methodologies* for state commissions to apply in setting reciprocal compensation rates, so long as States "determin[e] the concrete result in particular circumstances." *AT&T*, 525 U.S. at 384; see *Verizon*, 535 U.S. at 489. And in *Iowa Utilities*, the Eighth Circuit invalidated FCC rate caps because they usurped "states' right to set the actual rates." 219 F.3d at 757. Here, the FCC has done exactly what this Court and the Eighth Circuit prohibited: It has set actual rates for reciprocal compensation.

A. Respondents argue that this case is different because the FCC—relying on a theory it devised only after the court of appeals struck down two prior justifications—invoked its general §201(b) authority over interstate communications. But nothing in *AT&T*, *Verizon*, or

Iowa Utilities suggests that the FCC can avoid those decisions by invoking that general authority. Those cases reason that the FCC may not set reciprocal compensation rates because §252 assigns that function to state commissions. See *AT&T*, 525 U.S. at 383-384; *Iowa Utilities*, 219 F.3d at 757. That rationale does not depend on whether a call is interstate or intrastate. In *Iowa Utilities*, for example, the Eighth Circuit struck down rate caps because they infringed "states' right to set the actual rates." 219 F.3d at 757. It did not limit its holding to intrastate applications of the caps, but struck them down across the board. See *ibid.* In *AT&T*, this Court specifically discussed the FCC's §201(b) authority and the 1996 Act's saving clause. 525 U.S. at 377-385 & n.5. Yet nowhere did the Court limit its §252 holding to intrastate calls. See *id.* at 383-384.

The cases draw no distinction between interstate and intrastate calls because §252 draws no such distinction. As the FCC explained in the rules reviewed in *AT&T*, "[t]he 1996 Act moves beyond the distinction between interstate and intrastate matters." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, ¶24 (1996). The FCC and state commissions have "parallel jurisdiction over both interstate and intrastate matters," with the FCC promulgating rules and state commissions setting rates. *Id.* ¶¶83-85. The FCC thus admits that §252 applies to both interstate and intrastate rates: "[T]he transport and termination of *all* telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)." Pet. App. 31a (emphasis added). Respondents' attempt to marginalize *AT&T*, *Verizon*, and *Iowa Utilities* as ad-

dressing only intrastate calls seeks to re-import into the statute a distinction Congress consciously rejected.

B. Respondents' reliance on §201(b) to avoid the conflict fails for several additional reasons.

1. First, the theory violates the canon that a specific provision prevails over a more general one. Section 252 clearly prescribes a more specific standard than §201(b): Section 201(b) merely requires rates to be "just and reasonable," while §252 requires rates to be "just and reasonable" *as measured by cost* and *as determined by state commissions*. That latter, more specific standard controls. Pet. 19-21.

The non-federal respondents contend that the specific-governs-general canon applies only when comparing the *scopes* of two statutes, not when comparing their substantive standards. AT&T Br. in Opp. 23-24. But that is incorrect. See *Nat'l Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 335-336 (2002); *Ohio Power Co.* v. *FERC*, 954 F.2d 779, 784-785 (D.C. Cir. 1992). Respondents speculate about situations where one statute has a narrower scope while the other has a more specific standard. AT&T Br. in Opp. 23-24. But those concerns are hypothetical here. Section 201(b) applies broadly to all "interstate or foreign communication by wire or radio," 47 U.S.C. §201(a), while §252(d)(2) applies only to the limited category of reciprocal compensation rates for telecommunications (a term that is already narrower than wire or radio communications), see 47 U.S.C. §§153(33), (43), (52), 251(b)(5), 252(d)(2). On any reasonable view, §252 *both* prescribes a more specific standard *and* has a narrower scope. At worst, §252 prescribes a more specific standard while the canon is neutral with respect to scope. Either way, §252 is more specific and therefore controls.

The government claims that §201(b)'s standard is not, in fact, more general, because the FCC can promulgate rules to implement it. Gov't Br. in Opp. 14-15. But the FCC has that same rulemaking authority with respect to §252. See *AT&T*, 525 U.S. at 377-385. A standard that requires rates to be just and reasonable and consistent with FCC rules is still more general than a standard that requires rates to be just and reasonable, based on cost, set by state commissions, and consistent with FCC rules. Respondents also urge that the specific-governs-general canon is only a "rule of thumb" and is subordinate here to the Act's saving clause. Gov't Br. in Opp. 15-16; AT&T Br. in Opp. 24-25. But that argument depends entirely on their construction of the saving clause—which, as explained below, is incorrect.

Finally, respondents' argument fails because it creates a conflict where none need exist. Pet. 21-22 n.6; *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). "[T]his Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Here, the two statutes are readily reconciled: Section 201(b) sets forth a general just-and-reasonable requirement, while §252 details what it means for a rate to be just and reasonable in the reciprocal-compensation context. Only the FCC's attempt to exercise its §201(b) authority in a manner that contradicts §252 creates a conflict.

2. The government claims Core's interpretation "conflicts with the language" of the 1996 Act's saving clause. Gov't Br. in Opp. 16-17. As Core explained, however, this Court construes saving clauses to preserve pre-existing authority, not to permit exercise of that authority in a manner that *conflicts with specific substantive*

provisions. Pet. 22-23. In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), for example, this Court refused to permit enforcement of state consumer-protection remedies that defied the statute's specific substantive provisions, even though they fell within the saving clause's literal terms. *Id.* at 384-385.

The government tries to distinguish *Morales* as "involv[ing] the interplay between a general savings clause * * * and a specific preemption provision." Gov't Br. in Opp. 17 n.9. But nothing in *Morales* limits that case's holding to situations where the "specific" provision is a preemption provision. That case rests on the broad principle that "the specific governs the general." 504 U.S. at 384-385; see *Miller* v. *Albright*, 523 U.S. 420, 457-458 (1998) (Scalia, J., concurring in judgment). And while the government claims the saving clause here is "very specific," Gov't Br. in Opp. 17 n.9, it is far more general than §252. Finally, the government continues to ignore that any conflict is purely of its own making—the FCC *chose* to exercise its §201(b) authority in a way that conflicts with §252.

In any event, the saving clause merely preserves the "Commission's authority" under §201(b). 47 U.S.C. §251(i). The only "authority" §201(b) confers is the power to prescribe "rules and regulations," not rates. Pet. 23-24; contrast 47 U.S.C. §205(a). Rather than address the statutory text, the government cites *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007), for the claim that §201(b) confers rate-setting authority. Gov't Br. in Opp. 17. But that case had nothing to do with the rate/rule distinction. And while the government protests that its rate-setting authority under §205 is irrelevant because that provision relates only to proceedings under

§§203-204 (Gov't Br. in Opp. 17-18 n.10), that proves Core's point: Where Congress wants to authorize the FCC to set rates, it knows how to do so.

By its terms, moreover, the saving clause applies only to §251, *not* §252. Pet. 24-25. Attempting to avoid that clear text, the government argues that §251 and §252 "cannot be separated" because §252 supplies the pricing standard that governs the reciprocal-compensation duty imposed by §251. Gov't Br. in Opp. 18. But Congress can, and did, separate the two: It enacted a saving clause that applies to one but not the other. The saving clause's reference to §251 makes clear that Congress's creation of the reciprocal-compensation duty in §251 does not eliminate the FCC's §201(b) authority to promulgate rules. But the saving clause's *omission* of any mention of §252 makes clear that the FCC's rules cannot supplant §252's pricing standards or displace the authority §252 assigns to the States.

Respondents' preservation challenges (Gov't Br. in Opp. 16; AT&T Br. in Opp. 25) lack merit. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); *Citizens United* v. *FEC*, 130 S. Ct. 876, 893 (2010). Core indisputably preserved its *claim* that, while the FCC may prescribe methodologies for setting reciprocal compensation rates, it may not set those rates itself. The various reasons why the Act's saving clause does not justify a contrary result are *arguments* in support of that *claim*—not separate claims. While the non-federal respondents argue that no "exceptional" circumstances excuse forfeiture here, AT&T Br. in Opp. 25-26 n.6, no excuse is necessary

where a party merely makes additional arguments in support of a claim raised below.

C. 1. The non-federal respondents (but not the government) try to distinguish *Iowa Utilities* as resting on "judicial estoppel." AT&T Br. in Opp. 17-18. But the Eighth Circuit clearly rejected the FCC's rate caps *both* on judicial estoppel grounds *and* on the merits. After discussing estoppel, the court held: *"Following the Supreme Court's opinion [in AT&T]*, we now agree with the FCC that its role is to resolve 'general methodological issues,' and it is the state commission's role to exercise its discretion in establishing rates." 219 F.3d at 757 (emphasis added). The italicized words make clear that the court rejected the rate caps on the merits.

2. The non-federal respondents also contend that the FCC did not actually "set rates" here because its order merely imposes *caps*. AT&T Br. in Opp. 18-19. But that only underscores the conflict with *Iowa Utilities*: The rate caps struck down there were likewise "upper limits higher than which the rates set by the state commissions shall not go." 219 F.3d at 756. Besides, the FCC admitted below that "this is a rate." Tr. of Oral Arg. 30 (D.C. Cir. Oct. 16, 2009). And because the rate cap is set below cost, it not only usurps state rate-setting authority, but also effectively *prohibits* state commissions from setting rates that comply with the statutory requirement that rates allow for recovery of costs.

The other arguments for treating the rate cap as a mere "pricing methodology" are equally unpersuasive. That carriers can charge ISPs (AT&T Br. in Opp. 19) does not change the fact that, *as between carriers*, the FCC has clearly set rates. And the FCC's mirroring rule (*id.* at 19-20) is irrelevant. The mirroring rule is a rule,

but the rate cap is a rate. Putting the two together does not transform the rate into a rule.

3. The non-federal respondents urge that §252 cannot mandate cost-based rates because one subsection permits "bill-and-keep" arrangements that set reciprocal compensation at zero. AT&T Br. in Opp. 26. But the cited provision permits bill-and-keep *only* if it "afford[s] the mutual recovery of costs." 47 U.S.C. §252(d)(2)(B)(i). For carriers with balanced traffic, bill-and-keep may satisfy that standard—it is, in essence, a "payment in kind" arrangement. Here, it does not.

Nor does the rate cap satisfy the requirement of "mutual and reciprocal recovery * * * of costs" merely because terminating carriers can try to recover costs from their customers who receive calls. AT&T Br. in Opp. 26-27. The plain meaning of "mutual and reciprocal recovery" is that interconnected carriers recover costs *from each other*, not from other parties. Carriers can *always* try to recoup costs from the call's recipient; the non-federal respondents' construction thus renders the statutory cost standard a nullity.

II. The Question Presented Is A Matter Of National Importance

A. Respondents urge that the question presented is unimportant because it affects only the "6 percent of Americans [who] use dial-up." Gov't Br. in Opp. 23. But "6 percent of Americans" is *several million people*. That broad impact enhances, rather than diminishes, the case's importance. The FCC admitted below that this case presents a "highly significant issue" that affects "a large number of people." Tr. of Oral Arg. 25-26 (D.C. Cir. Oct. 16, 2009). And the government regularly stresses the importance of matters affecting far fewer. See, *e.g.*, Pet. Reply in *Reno* v. *Navas*, No. 98-996, at 6 (Feb.

1999) (case "vitally important" because it affected "thousands"); Pet. Reply in *DeMore* v. *Kim*, No. 01-1491, at 1 (June 2002) (similar), cert. granted, 536 U.S. 956 (2002).

Respondents also contend that the case is unimportant because the rate cap is not, in fact, below cost. AT&T Br. in Opp. 32; cf. Gov't Br. in Opp. 21. But sworn expert testimony—neither refuted below nor rejected by the FCC—showed that the $0.0007 rate cap was roughly *one-fourth* the $0.0027 average rate set under the cost-based regime. C.A. App. 209, 237-239. The FCC itself described the rate cap as an effort to "*limit[]* carriers' opportunity to recover costs," Pet. App. 940a-941a (emphasis added), and a "transition toward" a regime where carriers receive *no compensation at all*, *id.* at 893a-894a. Respondents' arguments thus rest on the implausible premise that the FCC set out to reduce rates below cost but accidentally set rates *at* cost instead. That the caps were based on negotiated interconnection agreements (AT&T Br. in Opp. 32) proves nothing; those contracts were negotiated at a time when the market expected the FCC to eliminate compensation rights. Pet. 9 n.1. Besides, the FCC's invasion of state authority warrants review even apart from the particular rate chosen.

The non-federal respondents claim that the FCC's mirroring rule renders the rate cap nondiscriminatory. AT&T Br. in Opp. 32-33. But a below-cost rate cap coupled with a mirroring rule imposes no hardship on carriers whose traffic is either balanced or mostly outgoing (*e.g.*, most incumbents). By contrast, it imposes severe hardships on carriers whose traffic is mostly incoming (*e.g.*, competitive carriers serving ISPs). Under the 1996 Act, *all* carriers are entitled to recover the costs of completing calls from the originating carrier. The mirroring rule cannot eliminate the burdens that the FCC's unlaw-

ful rate cap imposes on competitive carriers, ISPs, and the millions of Americans they serve.

B. Even apart from the FCC's departure from the cost-based standard, the decision below is important because it upsets the federal-state balance. Pet. 30-31. The government contends otherwise, urging that the 1996 Act allows the FCC to set rates under §201(b). Gov't Br. in Opp. 24. But that simply assumes the correctness of the FCC's position. Because Congress assigned that rate-setting function to the States, the decision below *does* upset the Act's federal-state balance. The government cannot make those federalism implications disappear simply by assuming its position is correct.

C. Finally, respondents nowhere dispute that the FCC's expansive interpretation of §201(b) has serious ramifications for other contexts such as broadband and VoIP. Pet. 31-33. They urge the Court to defer review until "such issues arise." Gov't Br. in Opp. 25. But the implications of the FCC's attempts to seize control over reciprocal compensation have been clear for years. As one commissioner recognized in 2001: "The Commission's decision has broad consequences for the future of telecommunications regulation. * * * [T]he Commission has dramatically diminished the States' role going forward * * * ." Pet. App. 1000a (Commissioner Furchtgott-Roth, dissenting). The government routinely seeks review where a decision's underlying logic would have serious repercussions elsewhere. See, *e.g.*, Pet. in *United States* v. *GWI PCS 1, Inc.*, No. 00-1621, at 18 (Apr. 2001); Pet. Reply in *NASA* v. *Nelson*, No. 09-530, at 4-6 (Feb. 2010). And the FCC never disavows its intent to apply its broad construction of §201(b) in other contexts. The FCC should not be permitted to expand its authority at

the expense of the States incrementally rather than in large bounds. For that reason too, review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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